

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 42 OF 1996

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ARVIND INVESTMENT CONSULTANT

Versus

PRESTO FINANCE LTD.,

Appearance:

MR KA PUJ for Petitioner

MR IM BENGALI for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT

Date of decision: 29/08/96

ORAL JUDGEMENT

Whether an appropriate case is made out for passing winding up order of the respondent Company Presto Finance Limited under section 433 read with section 439 of the Companies Act, 1956 is the sole question which has come up for adjudication in this petition.

The petitioner, Arvind Investment Consultant, is a proprietary firm of Smt. Rekha Arvindbhai Shah, who has filed this petition for order of winding up of Presto Finance Limited. The petitioner is carrying on business of investment. The respondent Company, Presto Finance Limited was incorporated under the provisions of the Companies Act, 1956 and its registered office is at Ahmedabad. The respondent Company was established for the following objects:

- "1. To carry on the business as finance company and to assist in or to finance and to carry on all kinds of financial operations including but without limiting the generality of the foregoing, long term/short term loans, seed capital, bridge loan, working capital, bill discounting, bill purchasing and hire purchase, deferred payment, installment sales and lease operations of all kinds and types, equity participation, preferential capital bonds, giving of guarantees, counter guarantees, indemnities and sureties.
2. To carry on the business of finance company and to finance in all kinds and types of assets whether of capital nature or otherwise including in shares, securities, bonds, units, saving schemes, other negotiable instruments and land, building, estate, properties, jewellery, diamonds, gold, silver, platinum and other valuable metals, stone and to deal in share and securities."

The petitioner had invested an amount of Rs.55,000/- at the behest of one Mr Hitendra B.Vasa, Managing Director of the Company for subscribing 5500 shares of Rs.10 each. Mr Vasa had agreed to buy back the said shares on 22.1.96 at the rate of Rs.16/- per share and an agreement was also entered with the petitioner specifying the above terms. Mr Vasa had also executed a promissory note of Rs.88,000/- in the capacity of proprietor of Jigna Consultancy Service. The Company had also given a cheque of Rs.88,000/- dated 22.1.96 drawn on Punjab National Bank, Ahmedabad with an assurance that the cheque would be realised when presented on its due date.

The respondent Company did not issue any share in favour of the petitioner till 22.1.96. Obviously, therefore, there was no question of buying back the shares of the company by Mr Vasa. The petitioner has also contended

that the amount of Rs.55,000/- was utilised by the company and in due discharge of that liability, a cheque of Rs.88,000/- was issued by the Company in favour of the petitioner. The said cheque on presentation came to be bounced firstly on 22.1.96 and secondly on 30.1.96. On both the occasions, the cheque came to be returned on the ground of arrangement being exceeded. It is, therefore, the case of the petitioner that the Company has failed to discharge its obligation as there was clear failure on the part of the respondent company to discharge its financial liability.

The petitioner, thereafter, was obliged to issue a statutory notice under section 434(1) of the Companies Act dated 2.2.96 demanding an amount of Rs.88,000/- along with agreed rate of interest, within 21 days from the receipt of the notice. However, a reply dated 27.2.96 was received from the advocate of the respondent Company wherein the claim of the petitioner was admitted. Thus, the respondent company admitted about the liability for payment as mentioned in the notice. However, one months time for making payment of the amount was sought. No demand was made thereafter and it is the case of the petitioner that no payment is, therefore, made.

On the aforesaid premises, the petitioner has contended that the respondent Company is unable to pay its debt within the meaning of section 434 of the Companies Act and is, therefore, liable to be wound up under the provisions of section 433 of the Act. It is also the case of the petitioner that similar assurances and promises are given by the company to large number investors and the company has not fulfilled its obligations and commitments.

It is also very clear from the affidavit of the petitioner that the respondent Company has failed to discharge its liabilities and make payment as per the cheque given by the Company and has gone virtually insolvent. It is also clear from the affidavit of the petitioner that the respondent company has incurred heavy liability and failed to discharge its liability towards many creditors. One of the contentions in the petition supported by the affidavit is that the Chairman and Managing Director of the respondent Company Mr Vasa, has issued cheques in favour of many creditors while taking advance for the Company's Public issue and therefore, the Company has played fraud and cheated the creditors. A list of some of the creditors to whom cheques were given and bounced back for insufficient funds is produced along with the affidavit of the petitioner. There are about 23

creditors who are not paid their dues by the respondent Company. In fact, this petition is one of the 10 petitions and other 9 creditors have also moved this Court for winding up order against the respondent Company.

It will be also interesting to mention that the Stock Exchange, Ahmedabad has also taken action against the respondent Company. On account of the action taken by the Stock Exchange, trading in Company's shares has been suspended and its shares have been delisted. Not only that, the Stock Exchange has also issued a public notice warning the investors and creditors to refrain from trading in the scrips of the respondent company and advising them to take such measures for redressal of their complaints and recovery of their dues, as they may be competently advised. This advertisement came to be published in Gujarat Samachar dated 18th April, 1996 which is also placed on record.

This petition came up for admission before this Court lastly on 25th April, 1996 before which the respondent Company was served with notice. No reply was filed after the notice. The petitioner came to be admitted on that day and necessary advertisements were ordered to be published in 'Indian Express' and 'Jansatta' newspapers, both published from Ahmedabad. Advertisement was given on 4th June, 1996 as directed by this Court wherein date of hearing was fixed on 19th June, 1996. While admitting the petitioner, interim relief was granted by this Court against the respondent Company restraining it from transferring any of its assets except in due course of business.

Pursuant to the advertisement published in the said newspapers under the order of this Court, several creditors have filed their affidavits along with the claims. There are serious allegations of fraud against the respondent company. There are allegations of breaches of undertaking given in favour of the Court. There are also criminal cases against the Directors of the respondent Company as also civil suits.

Though several creditors have filed affidavits and the petitioner company has also filed affidavit, nobody has filed affidavit on behalf of the respondent company. On the contrary, it is an admitted fact that the petitioner company had given a cheque of Rs.55,000/- and the respondent Company only requested for one months time for payment of Rs.55,000/- along with interest which amounted to Rs.88,000/-. Therefore, more than sufficient time has

elapsed, but no payment is made . Nothing is shown which would even remotely suggest or indicate that the respondent company is in a position to pay the dues of the petitioner company.

Section 433 of the Companies Act reads as under:

"433. A company may be wound up by the Court---

- (a) if the company has, by special resolution, resolved that the company be wound up by the Court;
- (b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting;
- (c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;
- (d) if the number of members is reduced, in the case of public company, below seven, and in the case of a private company, below two;
- (e) if the company is unable to pay its debts;
- (f) if the Court is of opinion that it is just and equitable that the company should be wound up."

It could be very well seen from the provisions of clause (e) & (f) of section 433 that if the court finds that the Company is unable to pay its debts or if the Court is of the opinion that it is just and equitable that the Company should be wound up, the Company Court is empowered to pass order of winding up under section 433. The facts and circumstances enumerated hereinbefore and emerging from the record of the present case, clearly indicate that there is a fit case for passing order of winding up against the respondent company on account of its inability to pay debts of the petitioner company as well as other creditors, and it is just and equitable in the circumstances that the Company should be wound up.

Notice of demand under section 434 (1)(a) of the Act about the dues of the petitioner company was served on the respondent Company. Though, reply was not given within 21 days period, in the reply given late, undoubtedly the dues are admitted and it was requested by the respondent Company through its lawyer in the reply to

the statutory notice, which is on record, to give one months time which was also given. In such a situation, the presumption has to be raised about the inability to pay the dues of the petitioner company. No doubt, in order to raise the presumption of inability to pay it is not enough to show that the Company has omitted to pay the debt despite service of statutory notice. It must be further shown that the company has omitted to pay without reasonable excuse. The petitioner has successfully shown that not only the respondent company has not paid its debt, but has also shown the inability of the respondent company to discharge the financial liability and dues. Not only that, the cheque which was given with an assurance for its honouring had bounced on account of insufficiency of funds. Apart from the inability to pay the dues of the petitioner, there is voluminous evidence on record to show that the substratum of the respondent company is totally lost. There cannot be any doubt from the material on record that the respondent company has totally lost its substratum. It was in this context that the interim order restraining the respondent company from transferring any of its assets or bringing any change in the management was required to be passed.

Following company petitions are filed by various creditors for winding up of the respondent Company:

1. Company Petition No.43 of 1996
2. Company Petition No.44 of 1996
3. Company Petition No.45 of 1996
4. Company Petition No.101 of 1996
5. Company Petition No.102 of 1996
6. Company Petition No.103 of 1996
7. Company Petition No.126 of 1996
8. Company Petition No.128 of 1996 and
9. Company Petition No.129 of 1996.

This court has no hesitation in finding that there is a fit and proper case for order of winding up of the respondent Company. Since this Court passing winding up order in this petition, in the aforesaid petitions winding up orders are not required to be passed. However, for disposal of each of the aforesaid petition, order is separately recorded in the respective petitions.

Section 434 of the Companies Act reads as under:

"434. (1) A company shall be deemed to be unable to pay its debts --

(a) if a creditor, by assignment or otherwise, to

whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by causing it to be delivered at its registered office, by registered post or otherwise, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the Company.

(2) The demand referred to in clause (a) of sub-section (1) shall be deemed to have been duly given under the hand of the creditor if it is signed by any agent or legal adviser duly authorised on his behalf, or in the case of a firm, if it is signed by any such agent or legal adviser or by any member of the firm."

It could be very well seen from the aforesaid provisions that in order to raise a presumption of inability to pay the debt, apart from service of notice, the position of the respondent is required to be shown leading to the presumption of inability to pay debts.

Having regard to the aforesaid facts and circumstances and considering the undisputed claim of the petitioner and admission of the respondent in the reply to the statutory notice, this Court is fully satisfied that there is justified and valid ground for passing an order of winding up of the respondent Company which will be in reality a first step in the direction of deeper probe of the affairs of the respondent Company, which is absolutely necessary in the light of the provisions of section 433 read with section 434 and 439 of the Companies Act.

Accordingly, the respondent Company, Presto Finance Limited is ordered to be wound up. Official Liquidator attached to this Court is appointed as Official

Liquidator of the Company with power under section 457 of the Companies Act.

The petitioner is directed to deposit an amount of Rs.3,000/- (Rupees three thousand only) towards the initial expenses of winding up which will be reimbursed by the Official Liquidator in due course of time out of the assets of the Company. The Registrar of this Court is also directed to send a copy of this order to Stock Exchanges of Ahmedabad and Bombay and Security Exchange Board of India (SEBI).
